STATE OF MICHIGAN

COURT OF APPEALS

KENDRA POND and KELAN POND,

Plaintiffs-Appellants,

v

SHELLY HABIAN and MITCHELL HABIAN,

Defendants-Appellees.

UNPUBLISHED
April 13, 2010

No. 289290
Oakland Circuit Court
LC No. 2007-087504-CZ

Before: SERVITTO, P.J., and BANDSTRA and FORT HOOD, JJ.

PER CURIAM.

In this real estate trespass action, plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We affirm. This case has been decided without oral argument pursuant to MCR 7.214(E).

The parties own adjacent units in a condominium development commonly known as Golf View Lake Estates. The instant action arises out of the encroachment of a portion of defendants' driveway onto plaintiffs' unit. The encroachment of defendants' driveway on plaintiffs' unit was not discovered until a survey was completed for plaintiffs in 2007.

Plaintiffs argue on appeal that the trial court erred when it determined that MCL 559.140, as the language existed at the time of the encroachment, granted defendants an easement for their driveway. We disagree.

This Court reviews the grant or denial of a motion for summary disposition de novo. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007); *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006). When reviewing a motion brought under MCR 2.116(C)(10), this Court considers the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Brown*, 478 Mich at 551-552. A grant of summary disposition is appropriate if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Brown*, 478 Mich at 552. A question of law, such as the interpretation of a statute, is reviewed de novo on appeal. *Taylor*, 475 Mich at 115. The interpretation of a contract is similarly a question of law subject to de novo review. *Holmes v Holmes*, 281 Mich App 575, 587; 760 NW2d 300 (2008).

When interpreting a statute, the primary goal is to give effect to the Legislature's intent. *Brown v Detroit Mayor*, 478 Mich 589, 593; 734 NW2d 514 (2007); *Grossman v Brown*, 470

Mich 593, 598; 685 NW2d 198 (2004). The language of the statute must first be reviewed. Judicial construction is neither required nor permitted if the statute is unambiguous on its face. It is assumed the Legislature intended the words expressed if the statute is unambiguous. *Brown,* 478 Mich at 593; *Grossman,* 470 Mich at 598.

MCL 559.140, as amended January 2, 2001, provides:

> To the extent that a condominium unit or common element encroaches on any other condominium unit or common element, whether by reason of any deviation from the plans in the construction, repair, renovation, restoration, or replacement of any improvement, or by reason of the settling or shifting of any land or improvement, a valid easement for the encroachment shall exist. *This section shall not be construed to allow or permit any encroachment upon, or an easement for an encroachment upon, units described in the master deed as being comprised of land and/or airspace above and/or below said land, without the consent of the co-owner of the unit to be burdened by the encroachment or easement.* [Emphasis supplied.]

The 2001 amendment added the second (emphasized) sentence of the statute, making it clear that any easement or encroachment could not be made without the consent of the co-owner of the unit to be burdened by the encroachment or easement. Because the Legislature did not clearly express an intent for the act to apply retroactively, this Court previously determined the amendment to MCL 559.140 may only be applied prospectively. *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 662; 651 NW2d 458 (2002).

While the encroachment was not discovered until 2007, the developer recorded the master deed for Golf View Lake Estates on May 24, 1989, and the residential structures were constructed on their respective units by April 2000. Because both events occurred before the effective date of the 2001 amendment of MCL 559.140, the original statute applies to the facts of this case. *Rossow*, 251 Mich App at 662.

The original statute is clear and unambiguous and should be interpreted as written. *Brown*, 478 Mich at 593; *Grossman*, 470 Mich at 598. There was a deviation between the siting of defendants' driveway on the approved plot plan and its actual placement. It is reasonable to conclude the error was due to a "deviation from the plans in the construction"[1] as envisioned by the Legislature in the language of MCL 559.140. Because the statute in effect when the encroachment occurred clearly stated that a valid easement exists for such encroachments, the

[1] We note that defense counsel asserted that he was unable to depose the builder who had left the state. Plaintiffs' counsel asserted that the builder returned, but did not indicate why he was not deposed. The parties requested that the trial court grant summary disposition because the facts were undisputed. The parties did not present evidence to address the reason why the driveway was constructed on the neighboring unit and nonetheless requested summary disposition based on the facts presented. See MCR 2.116(A)(1), (2). Therefore, plaintiffs' challenge to the construction deviation is without merit.

trial court correctly granted defendants' motion for summary disposition and dismissed plaintiffs' claim of trespass. MCL 559.140; *Rossow*, 251 Mich App at 662.

Plaintiffs argue that even if the amended language of MCL 559.140 is not applicable, it should be used to interpret the original language because it indicates the intent of the statute. This claim is without merit. To hold otherwise would render meaningless the Legislature's decision to give effect to new statutory language either prospectively versus retroactively.

Plaintiffs attempt to distinguish the ruling of *Rossow*, 251 Mich App at 662, based on the fact that the condo association in that case had recorded an easement against the plaintiffs' unit before the 2001 effective date of the amendment, while in this case no such amendment was ever recorded. This argument is also without merit. This Court's holding in *Rossow*, 251 Mich App at 662-663, was not dependent on the language of the master deed; rather, the *Rossow* Court held that both the statute and the master deed supported the existence of an easement. *Id*. Accordingly, the trial court properly determined that MCL 559.140, as enacted at the time the encroachment occurred, granted defendants an easement for the encroachment. *Rossow*, 251 Mich App at 662-663; see also *Brown*, 478 Mich at 552.

Affirmed.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood